

Plant Variety Protection Board Meeting Minutes  
March 20 and 21, 2007  
Room 4-2223  
USDA George Washington Carver Center  
5601 Sunnyside Avenue  
Beltsville, Maryland 20705

Board Members attending (with affiliation):

June Blalock; USDA, ARS, Office of Technology Transfer  
Kelly Book; Texas Department of Agriculture  
Kent Bradford; University of California, Davis  
Steven Callistein; Pioneer Hi-Bred International, Inc.  
Harry Collins; Delta and Pine Land Company  
John Gardner; University of Missouri  
Carl Johnson; California Cooperative Rice Research Foundation, Inc.  
Russell Karow; Oregon State University  
Patrick Kole; Idaho Potato Commission  
V. Larkin Martin, Martin Farm/The Albemarle Corp.  
Bernice Slutsky; American Seed Trade Association  
Larry Svajgr; Indiana Crop Improvement Association  
Katherine White; Wayne State University

USDA and AMS staff:

Bruce I. Knight Under Secretary for Marketing and Regulatory Programs  
Kenneth Clayton, Associate Administrator, USDA/AMS  
Robert Epstein, Deputy Administrator, USDA/AMS/Science and Technology  
Alan Post, Associate Deputy Administrator, USDA/AMS/Science and Technology  
Robert Ertman, USDA/Office of the General Counsel

Plant Variety Protection staff:

Gwen Adams, PVP Analyst  
Lidia Carrera, Examiner  
Robin Davis, Examiner  
Mark Hermeling, Quality Assurance Examiner  
Sheila Littleton, PVP Analyst  
James Mantooth, Associate Examiner  
Janice Strachan, Examiner  
Jeff Strachan, Examiner  
Bernadette Thomas, Information Technology Specialist  
Beretha Thornton, Examiner  
Paul Zankowski, Commissioner

Visitors: Sign Language Interpreters

Opening remarks were made by Bruce Knight, Kenneth Clayton, and Robert Epstein.

The meeting agenda was adopted. The Board approved the minutes of the October 2005 meeting with a comment that the crop kind rape be identified as canola and that better phrasing be used to regarding "tax the inefficient".

## **Reports:**

### **Overview of Application Contents and Examination Procedures. Janice Strachan.**

The Plant Variety Protection Office (PVPO) is organized within the USDA, Agricultural Marketing Service (AMS). Seed reproduced and tuber propagated plant varieties are eligible for PVP, including first generation hybrids. The number of incoming PVP applications was greatest in 1999 (435 applications) and has since declined to an average of 322 new applications per fiscal year. The agricultural crops (corn, soybean, cotton, etc.) account for 76% of incoming applications, followed by vegetables (17%), tubers (5%), and ornamental crops (2%).

A plant variety must be new, distinct, uniform, and stable in order to qualify for a Plant Variety Protection Certificate. The application packet contains the necessary documents and supporting evidence to describe the variety and how it meets these criteria. The contents of the application packet were described to show where each piece of information is to be placed. The PVP Office has 12 people on staff. The examiners have a wide range of skills, including various plant science disciplines and legal and administrative skills. The processing of applications is done by the examiners, reviewed for quality assurance, and by the commissioner. Of all applications filed, 83% are granted Certificates of Protection. The average processing time is 26 months. Most applications that are not granted Certificates of Protection are abandoned or withdrawn by the applicant.

The rights granted for U.S. PVP were discussed in addition to the farmers and research exemptions. The PVP certificate holder's responsibilities including seed replenishment, seed bag labeling, and change of address.

During the question and answer period, two Board members commented that the efficiency of the office is improved by having examiners assigned to specific crops, so that they gain knowledge and skills related to the crops. This helps by allowing examiners to batch the examination of all applications in a crop soon after the database has been updated and while the characteristics of the crop are fresh in the examiner's mind. Board members also like that they can call and talk to the examiner to clarify questions they have about office processes. Another Board member asked, if there were no limitations, what is needed to improved office efficiency. We are missing technically-qualified information specialists now that all associate examiners have been promoted to full examiners. These positions were initially created based on Board feedback to assist with finding variety descriptive information, updating databases, and doing some of the routine chores in support of examiners, thus freeing up examiner time to focus on examinations. More discussion about improvements was deferred until the discussion on finances.

**PVP Finances. Robert Epstein.** The current fee structure for PVP was presented. While the PVPO is funded by user fees, the office may conduct inherently governmental activities including the conversion and internet publication of all issued PVP applications/certificates, participation in international forums such as the Union for the Protection of New Varieties of Plants (UPOV), publication of an Official Journal, and compliance with government practices and maintenance of repository data system and software upgrades. In order to maintain an adequate reserve in the PVP Trust fund the AMS increased fees by 35% increase in 2003, a 6.1% in 2005, and 18.8% in 2006.

The PVPO had surpluses to the Trust Fund in FY03, 2004, and 2005; however beginning

in FY06 the PVPO had a \$14,000 deficit with further deficits predicted beyond FY2007. (The FY = Fiscal Year and covers October 1 to September 30. Income is estimated from 325 expected applications for each year after FY07.) The major obligations each fiscal year were salary, rent, contracts, and overhead fees. Potential solutions to the deficit problem include 1) decreasing obligations, 2) increasing fees, 3) requesting an appropriation, or 4) a combination of all three.

A scenario was presented for the obligation/revenues trend based on increasing PVP fees by 20% in FY2009 and by 10% in FY2010. Under this plan the PVPO was projected to have a \$178,000 surplus in 2009 and a \$326,000 surplus in 2010. The Board was reminded that during the 2003 Board meeting a 10% fee increase was recommended but was not activated by AMS.

The Board wanted to know what contracts the PVPO had (these are outsourced computer servicing contracts). The Board was concerned about the PVPO's uncertainty in establishing annual budgets for rent and overhead (these costs are often unknown until the budget year begins). The Board wanted an analysis of what user benefit (reduction of the backlog, hiring new staff, etc.) would be accomplished from 20 and 10% fee increases.

It was indicated that without the fee increases significant deficits would begin occurring against the PVPO Trust fund beginning in FY2008. It was also indicated that the labor costs to process the fee increase is about \$125,000 and would require about one and a half years to complete. The Board questioned why there was a large increase in salary between 2003 (\$803,000) to 2007 (\$1,187,000). The Board also commented that the fee increases are large over time and that the PVPO may be pricing itself out of business.

The Board further commented that they would like more details on obligations over the past several years; they were concerned that while fees are increasing – PVP applicants are getting nothing in return. The Board wanted to know if AMS would be asking for an appropriation for the PVPO in the future (AMS will be requesting an appropriation for FY2009). The Board indicated it would be willing to assist with an appropriation request.

The Board suggested that the PVPO provide a strategic plan that would provide information on personnel, promotions, technology, etc. They suggested that PVPO develop a succinct and detailed five year plan with strategic goals and objectives.

A motion was proposed that AMS develop a five year plan with goals for 1) PVP application processing, 2) PVP information technology infrastructures, and 3) PVP international activities (in addition to fee increases AMS consider other revenue sources such as appropriations and look to other models for fee-for-service organizations); and 4) introduction of cost efficiencies if feasible. The Board planned to work on this motion – with the final version presented below.

This statement regarding the PVP finances was approved by 11 of the 12 Board members (the dissenter was in favor of a 10% fee increase and not a 20% increase):

The Plant Variety Protection Office (PVPO) is an invaluable asset both domestically and internationally for the United States generally and American agriculture specifically. Stability, continuity and improvements in the operations of the PVP office are vitally important to protecting valuable intellectual property rights that strengthen the American economy. Therefore, the Plant Variety Protection Advisory Board ("Board") recommends that the Plant Variety Protection office develop a strategic plan that includes:

1. a plan for efficiencies in processing applications;
2. a plan for enhancing the IT structure
3. a plan for enhancing the value of PVP that goes beyond processing applications such as
  - a) options for reciprocity among UPOV member countries of DUS assessments;
  - b) advocacy related to judicial decisions that affect how PVP rights are obtained and enforced;
  - c) mechanisms for more active involvement in international organizations such as UPOV in considerations such as EDV and the use of molecular markers.

The Board further recommends that the PVP Office continue to introduce cost efficiencies in the organization. In addition to fee increases, that the PVP Office considers other revenue sources such as appropriated revenue and that they look to other models of “fee for service” organizations.

The Board cautions the PVP Office to consider the balance between continued fee increases and the value for the applicants that are providing those fees.

The Board agrees to a fee increase of 20% with the conditions:

1. The PVP Office provides an outline of a strategic plan to the Board within 60 days (June 1, 2007);
2. This outline is discussed with the Board via conference call;
3. Progress in the strategic plan is on the agenda of the next full Board meeting which will take place within one year;
4. Full and adequate disclosure of the finances of the PVP Office.

**PVP Accomplishments from October 2005 to March 2007.** Paul Zankowski. The PVPO has 12 full time staff plus a summer student. In the past year an associate examiner was promoted to examiner and an examiner retired. The newest examiner’s crops will be assigned in mid April. In FY2006 the PVPO received 304 new applications; 260 applications were removed from the backlog by certificate issuance, abandonment, withdrawal or otherwise disposed of during the year. The PVPO backlog increased from 654 applications at the end of FY2005 to approximately 718 applications at the end of FY2006. The top incoming PVP applications in FY2006 were corn, wheat, cotton, soybean, lettuce, and potato.

The fee structure for the PVPO was presented; the typical total fee for filing, searching, and certificate issuance is \$5,150. The credit card payment of many of these fees increased from \$33,353 collected in FY05 to \$90,786 collected in FY06. The top three most common credit card payments were for new PVP applications filing/examination, certificate issuance, and making copies. The PVPO is working to develop a web based interface for credit card payment; currently credit payments are sent in via fax.

The PVPO has continued to increase the number of scanned PVP certificates/applications made available to the public through the PVP website. The scanned material is available as a pdf image file and includes everything in PVP application, i.e. breeding history, distinctness statement, objective description, statistics, etc.

The PVPO has provided domestic training internally and at corporate sites over the past several years; Janice Strachan has been instrumental at organizing all training. International outreach and training on the U.S. PVP system has also been provided to Vietnam, China, and to

several countries through the Institute of International Agriculture at Michigan State University.

The PVPO has continued to evaluate means for converting the existing hierarchal Cuadra STAR database developed to Microsoft SQL Server 2000, a relational database. The FY2005 cost estimate for this conversion was \$1.5 million (approximately \$200,000 work has been done). Current estimates for the conversion and retaining user functionality is \$2 to 3 million.

**PVP E-Business and Database Migration Plans.** Bernadette Thomas. The PVPO has been evaluating the conversion of the STAR database to Microsoft SQL over the past several years. The first phase of this project cost \$208,000 and included the development of a work plan, database functional requirements, alternatives document, and the recommended database design. Phases 2 through 5 have not been completed and would include data conversion, maintenance, system enhancements, manuals, and training. The last cost estimates for these phases 2-5 was \$1.3 million. The Board asked if the PVPO could hire a programmer and accomplish these phases more cheaply.

The project to scan PVP certificates to electronic pdf files has fulfilled two objectives – to provide the public with free access to material which previously cost \$1.80 per page for paper copy and to provide the PVPO with an archival backup of the paper PVP certificates. PVP certificates are scanned using the office copier/scanner/printer, the pages are counted and the scan images are verified before posting to the website. The labor/materials for scanning is funded by the \$250 electronic conversion fee that is charged for PVP certificates issued after June 20, 2005 but the cost of scanning prior certificates is funded by drawing from the PVP Trust fund..

Approximately 43% of all issued PVP certificates have been scanned and all PVP certificates that are in the issuance process will be scanned. In addition, 2,728 issued and 973 expired PVP certificates remain to be scanned. In the future the scanned images may be optically character recognized so text can be searched, and the examiner's documentation and applicant correspondence side of the file folder may be scanned for archiving.

The PVP ST470 Application form and most Exhibit C forms have been converted into a pdf format. The OMB (Office of Management and Budget) approved forms are currently on the web in non-fillable pdf format only; however fillable Word versions of these forms are available to the public upon request. Future form development goals include fillable forms with means to submit the completed electronic form data through the internet.

The PVP has collected fees using credit cards since April 2005. A prototype web based credit card system for the payment of fees is being developed and may be available in the spring 2007. The web based system has required the development of use-cases for new applications, certificate fees, and for late fee payment. The AMS Information Technology (IT) Business branch is testing a secure connection with the Pay.gov servers to process future credit card transactions. This system will require that all web based credit card users establish USDA e-authentication as a verification method.

**Use of Molecular Data in DUS determination.** Robin Davis. The PVPO establishes that an applicant's variety is distinct from other varieties based on morphological, physiological, molecular characteristics and other data. The PVPO has accepted molecular data submitted by applicants to differentiate a new variety from a few older varieties or that establishes that the applicant's variety is different from the most similar comparison varieties. The molecular data 1)

must be treated the same as other methods used to establish distinctness, 2) meet the quality controls in place for appropriate supporting evidence, 3) prove that the difference is present in all individuals of the varieties 4) can be relied upon to prove the distinctness to anyone who performs the tests, and 5) must use published procedures and reagents that are available to everyone who wants to perform the tests.

Problems with molecular techniques include: 1) ability to distinguish a new variety from all previously existing varieties, 2) older varieties without any genetic profile, and 3) older varieties may not be sufficiently uniform and stable to have the profile be meaningful. Morphological data will continue to be necessary to differentiate older varieties from newer varieties until all older varieties are profiled and those profiles are available.

The PVPO agrees with the seed industry's position that additional studies should be performed, informative markers need to be publicly available, additional markers need to be identified for specific crops, and traditional traits (morphology, physiology, and other characteristics) will continue to be the basis of DUS.

A brief report on the UPOV-Biochemical and Molecular Techniques and DNA Profiling in Particular Working Party (BMT) Workshop and Meeting held in November 2006 by Michael Sussman was given.

The PVPO asked for the Board's assistance with molecular techniques guidelines that will be posted on the PVP website as follows:

The PVPO will accept differences using molecular techniques (DNA fingerprinting) only if:

- the molecular marker locus is publicly disclosed and cited (cites to URLs such as Soybase or MaizeGDB are acceptable);
- the molecular marker locus is clearly identified;
- the specific differentiating data is cited;
- if photographic copies are provided, they contain sufficient resolution of scientific publishable quality gels or other molecular data with sufficient resolution and labeling to resolve the individual data in question are provided;
- the molecular marker locus can be detected by a third party

For example, in the case of:

SNPs - the locus is defined by the SNP sequence showing the substitution or indel

SSRs - the locus may be defined by primer pairs or sequence

AFLPs - the locus is defined by primer pairs

RAPDs - the locus is defined by primer pairs

**Changes to Certified Seed Option procedure by PVPO.** Jeff Strachan and Beretha Thornton. Once a PVP applicant has specified the certified seed option – they must sell the seed as certified, even if the PVP certificate has not issued. This situation occurs because the certified seed option is published on the Germplasm Resources Information Network (GRIN) website for pending PVP applications and section 97.16 of the PVP Regulations and Rules of Practice specifies that “Once an affirmative specification is made, no amendment to reverse such a specification will be permitted unless the variety has not been sold and labeled or publication made in any manner that the variety is to be sold by variety name, only as a class of certified seed.”

The procedure for seed certification and its benefits were described. Approximately 24%

of all PVP applications elect the certified seed option – with more than 75% of the applications for peanut, barley, field pea, and wheat electing this option. The option is selected on the PVPO application form (S&T-470) in a section asking “DOES THE OWNER SPECIFY THAT SEED OF THIS VARIETY BE SOLD AS A CLASS OF CERTIFIED SEED?”. A “Yes” reply indicates that the variety is to be marketed only as a class of certified seed, and cannot be reversed. PVP Examiners will often communicate with an applicant if they believe the selection was a mistake before this is made public.

A PVP applicant has limited options if the certified seed option was selected by mistake. For pending applications the applicant needs to either 1) sell the variety only as a class of certified seed or 2) if the variety was never sold/labeled as certified seed and is new, withdraw the PVP application (lose \$4,382); and re-file (pay another \$4,382) a new PVP application. For issued PVP certificates the owner must either 1) sell the variety only as a class of certified seed or 2) voluntarily abandon the PVP certificate (lose all PVP rights) so the certified seed restriction no longer applies. If certified seed option seed is sold as uncertified, seed warnings and violations would be levied by the Seed Regulatory & Testing Branch.

The PVPO asked the Board if it should stop publishing the certified seed status on GRIN so mistakes could be reversed for pending applications. A Board member commented that not publishing this information would be a disadvantage for PVP applicants who wanted the certified seed status and that Texas looks at the GRIN website for information on the pending PVP applications. The Board suggested changing the words of Box 20 of the ST470 form from “DOES THE OWNER SPECIFY THAT SEED OF THIS VARIETY BE SOLD AS A CLASS OF CERTIFIED SEED?” to “DOES THE OWNER SPECIFY THAT SEED OF THIS VARIETY BE SOLD AS ONLY A CLASS OF CERTIFIED SEED?”- noting the emphasis on “ONLY”. The Board also indicated that a third option of “UNKNOWN” should be included instead of “Yes” or “No” choices and that the implications of selecting “Yes” need to be indicated on the ST470 form and the PVP website.

The Office of General Counsel (OGC) asked if it would be a burden to the state regulatory agencies if the certified status was published only at the PVP certificate issuance stage. Board members indicated that no change should be made to the current certified option publication procedure for pending applications and that section 97.16 of the Regulations and Rules of Practice be left unchanged until the ramifications of these changes are better assessed. Board representatives from the American Seed Trade Association (ASTA) and Association of Official Seed Certifying Agencies (AOSCA) will discuss this issue with their members.

The Board recommended the following 1) do not change the procedure to publish the certified seed election on GRIN for pending PVP applications, 2) get comments from the ASTA and AOSCA membership, 3) change ST470 form box 20 by inserting “Only” as indicated above and adding a UNKNOWN choice, and 4) better explain how to fill in the ST470 on the web and indicate the implications of answering “Yes” for the certified seed option.

### **Issues regarding what constitute “exploitation” and the “new” criteria for PVP.**

Lidia Carrera. The issue regarding “new” for Plant Variety Protection is based on section 42 (a) of the Plant Variety Protection Act which describes a variety as new if propagating material has not been sold, by or with the consent of the breeder for the purposes of exploitation of the variety.

The method for developing new potato varieties was described from true seed to hill plots

to observational /replicated regional trials which usually requires about 5 years. Potato is unique in that many selections (numbered clones) may survive the initial stages of a potato breeding program. Many of these selections will be discarded and never released. The decision to name and release a selection as a new variety is made only after testing with several public and/or private entities. Testing requires the establishment of disease free plantlets in tissue culture, the production of mini-tubers and subsequent disease-free seeds; a process that encompasses several years. Testing requires the production of sufficient quantity of disease-free seeds to validate the testing procedure. The production of disease free seed is usually done under contract by an outside firm which charges for seed production.

Because of the extensive propagation of potato and the exchange of money for this service, the PVPO formed a Potato Working Group composed of 25 experts to provide advice on what criteria may and may not constitute “exploitation” in the development of potato varieties.

Following a conference call on March 12 the Potato Working Group recommended that “the first sale of a new variety be defined to occur as the first sale after the official release notice (or in-house approval) has been signed by the employing agency’s official representative, which effectively changes the status of the clone from a numbered selection for testing to a new variety”.

The Board asked what is the largest acreage of trialing that should be allowed before a sale has occurred and when does a variety trial change from breeder to market research. A Board member indicated that 12 years are often required from the initial cross to an established variety. A Board member also explained that trialed potatoes need to be sold to a processor because the variety developer cannot afford the cost of trials without selling the harvested material.

OGC indicated that we were looking for the Board’s comments on what constitutes “exploitation”. He further explained that even with the Working Group’s recommendation it is possible to “sell” a variety without information about the variety’s performance going back to the breeder. OGC indicated that information needs to go back to the breeder from the trialed variety in order to avoid exploitation.

The Board indicated that potato market evaluation is a necessary step for variety development. One Board member commented that in the U.S. Patent and Trademark Office (PTO) the first sale would be defined through case law and that market testing would not be considered experimental. The Board suggested that a sentence be added to the Working Group’s recommendation about a Material Transfer Agreement (MTA) and data collection

The Board recommended and moved that the statement be modified as follows:

Define the first sale of a new variety to occur as the first sale after the official release notice (or in-house approval) has been signed by the employing agency’s official representative, which effectively changes the status of the clone from a numbered selection for testing to a new variety. Any testing of numbered selections prior to official released must be under Material Transfer Agreement (MTA) which required data collection and reports.

This statement does not change the definition of "first sale". By providing this statement the Board is advising the industry on a course of conduct calculated to keep variety owners safe from starting the clock ticking before they are ready.

A Board member commented that ASTA is interested in the potato industry’s experience with China intellectual property rights and that if the potato industry wants variety protection they will need to enforce it.



**Ideas for speeding processing of PVP applications and improving application quality.** Mark Hermeling. The PVPO has received applications which have taken very long to process; an example was given of an application that required six letters to the applicant, one extension granted, and 2,249 days from application date to issuance date. Improving the quality of applications is the responsibility of both the applicant and the PVPO. The applicant should 1) provide the required information in a useful format, 2) check the PVPO website periodically, and 3) attend PVP training. The PVPO should 1) be consistent in reviewing applications, 2) keep the PVPO website up to date, and 3) offer training.

In order to speed up PVP application processing the PVPO needs to stop the repetitive correspondence loop back and forth to applicants. If the applicant does not adequately respond to a PVP letter of inquiry that application will be “denied” or “abandoned” but may be reconsidered or revived after payment of a \$518 fee. This would provide the applicant with a financial incentive to improve the quality of their work and is a means of conveying the additional cost of working on deficient applications to those applicants.

The Board recommended that the PVPO 1) give the applicant 2 chances to adequately respond before “denying” the application then charge a \$518 reconsideration fee, 2) follow the U.S. Patent and Trademark Office (PTO) process for reconsideration and applying the charge, and 3) flowchart the denial process for PVP applicants. The Board recommended that the heading “Final Notice” appear at the top of the second letter which is sent to PVP applicants.

**Future Program Activities of the PVP.** Paul Zankowski. The top 20 incoming PVP applications crop kinds in order were Corn, Soybean, Wheat, Cotton, Lettuce, Potato, Kentucky Bluegrass, Tall Fescue, Perennial ryegrass, Bean, Pea, Field Pea, Field Bean, Rice, Barley, Peanut, Rape, Oats, Pepper, and Sorghum. These crops comprised 84% of the incoming PVP applications since 1/1/2000.

The PVP backlog of approximately 826 applications has about 15% of the applications from FY2003 and before. Major goals for the PVPO are to 1) dispose of all remaining 2000 through 2003 PVP applications, 2) reduce the current backlog by approximately 300 applications, and 3) reduce PVP certificate issuance time to less than 600 days. The PVP trend for certificate issuance is 239 to 270 certificates issued each of the two previous years; approximately 400 should be issued in FY07.

E-business goals of the PVPO include internet availability of all scanned expired and issued PVP certificates, internet credit card payment of fees, making electronic forms fillable, and to provide a system for electronic application filing.

The purpose of a PVP Journal as specified by the Plant Variety Protection Act includes: listing of acceptable germplasm depositories, public notification of a missing PVP owner, publication of information for pending applications, public notice of the removal of certified seed restriction following an application or certificate abandonment, service of papers when other means fail, and the publication of variety descriptions. The Journal was last published and distributed in 2000 and most of its functionality has been replaced by a combination of the Germplasm Resources Information Network (GRIN) and PVP websites. It was estimated that the information gathering, editing, and electronic publication of a Journal would require one staff person full time. The Board considered the Journal important, but not a priority to focus a

fulltime staff person; and they indicated if it were published it should only be in electronic format.

The rent charged by the NAL has increased an average of 15% per year, with a 60% increase in FY06. The PVPO currently pays over \$32 per square foot rent, whereas a new commercial office nearby is expected to charge \$25. It was estimated that by moving the PVPO to a new office, the reduction in rent and annual increases would save \$750,000 to \$1.4 million over 10 years. The Board recommended instead of considering PVPO relocation that the Undersecretary for Marketing and Regulatory Programs (MRP) and the Undersecretary for Research, Education, and Economics become aware of this issue to provide the PVPO with a more reasonable long term rent rate.

Other issues brought forward were the two recent decisions by the Court of Appeals for the Federal Circuit on the Syngenta vs. Delta Cotton adverse decision to a PVP certificate owner and the decision that a variety name cannot be trademarked.

The Board was alarmed by the Syngenta vs. Delta Cotton decision and recommended that the Secretary communicate with the House Judiciary Committee that it was disturbing for the Federal Circuit to draw an analogy of the Plant Variety Protection Act (PVPA) to the Patent Act. A Board member commented that there is no advocate to argue on behalf of the PVPA unlike the patent office does in patent dispute cases. The member said that the Federal Circuit justices need to become more aware of the PVPA. It was suggested that the Board communicate to the Secretary of Agriculture that more needs to be done to advocate for the PVPA in these legal cases.

A Board member asked OGC how the Board can help in these cases and OGC responded that neither the OGC nor USDA provides amicus briefs in infringement cases; enforcement of PVP rights is strictly private. OGC said that the only instance that an amicus brief was filed was when the Supreme Court asked the USDA for that information. OGC has no way of knowing about infringement cases in advance and that for the Syngenta vs. Delta Cotton case the Federal Circuit justices did not allow any new information. A Board member indicated that the Federal Circuit Court has an Office of Technical Assistance, but no one in that office has an agriculture background. The USDA should communicate with this office to provide information on the PVPA.

**Meeting adjourned.**

## **Summary List of Recommendations by the Board:**

### **Board Recommendation 1.**

Statement on PVPO Finances - Moved and Approved by 11 of the 12 Board members:

Plant Variety Protection Office (PVPO) is an invaluable asset both domestically and internationally for the United States generally and American agriculture specifically. Stability, continuity and improvements in the operations of the PVP office are vitally important to protecting valuable intellectual property rights that strengthen the American economy. Therefore, the Plant Variety Protection Advisory Board (“Board”) recommends that the Plant Variety Protection office develop a strategic plan that includes:

1. a plan for efficiencies in processing applications;
2. a plan for enhancing the IT structure
3. a plan for enhancing the value of PVP that goes beyond processing applications such as:
  - a) options for reciprocity among UPOV member countries of DUS assessments;
  - b) advocacy related to judicial decisions that affect how PVP rights are obtained and enforced;
  - c) mechanisms for more active involvement in international organizations such as UPOV in considerations such as EDV and the use of molecular markers.

The Board further recommends that the PVP Office continue to introduce cost efficiencies in the organization. In addition to fee increases, that the PVP Office considers other revenue sources such as appropriated revenue and that they look to other models of “fee for service” organizations.

The Board cautions the PVP Office to consider the balance between continued fee increases and the value for the applicants that are providing those fees.

The Board agrees to a fee increase of 20% with the conditions:

1. The PVP Office provides an outline of a strategic plan to the Board within 60 days (June 1, 2007);
2. This outline is discussed with the Board via conference call;
3. Progress in the strategic plan is on the agenda of the next full Board meeting which will take place within one year; and
4. Full and adequate disclosure of the finances of the PVP Office.

(Note: the one dissention was in favor of a 10%, not a 20% increase.)

### **Board Recommendation 2.**

For the Certified Seed Option 1) continue to publish the certified seed election on GRIN for pending PVP applications, 2) get comments from the ASTA and AOSCA membership, 3) change ST470 form box 20 by inserting “Only” as indicated above and adding a UNKNOWN choice, and 4) explain how to fill in the ST470 on the web and indicate the implications of answering “Yes” for the certified seed option.

### **Board Recommendation 3.**

Define the first sale of a new variety to occur as the first sale after the official release notice (or in-house approval) has been signed by the employing agency’s official representative, which effectively changes the status of the clone from a numbered selection for testing to a new variety.

Any testing of numbered selections prior to official release must be under MTA which required data collection and reports.

Board Recommendation 4.

A letter be drafted by the Secretary to the House Judiciary Committee regarding the Federal Circuit decision and the analogies between the Plant Variety Protection Act (PVPA) to Patent Law.

The Board selected a seven member panel that will be available to hear an Appeal to the Secretary if one should occur.